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No. 90-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES W. BURSON,
ATTORNEY GENERAL AND REPORTER
FOR THE STATE OF TENNESSEE,
Petitioner,

v.

REBECCA FREEMAN,
Respondent.

On Writ of Certiorari
to the Supreme Court of Tennessee

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Tenn. Code Ann. § 2-7-111, which prohibits the distribution of campaign literature, display of campaign materials, or solicitation of votes within 100 feet of the entrance of a polling place on election day in Tennessee, violates the Free Speech Clause of the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. This case

presents an issue of great concern to *amici*: the constitutionality of state regulations governing electioneering immediately outside the entrances to polling places. Almost every State forbids electioneering within a specified number of feet of a polling place on election day. *See* Pet. App. at 21a-50a. The prohibition of electioneering within 100 feet of a polling place contained in Tenn. Code Ann. § 2-7-111 is typical of those provisions.

Amici believe that the Tennessee Supreme Court erred in ruling that § 2-7-111 violates the First Amendment. An affirmance of that decision would call into question the validity of comparable provisions in the election laws of other States, even though the validity of those laws has gone unquestioned for many years. *Amici* accordingly submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt petitioner's statement of the case.

SUMMARY OF ARGUMENT

1. The States' authority reasonably to regulate elections and the electoral process is established by a long line of this Court's decisions. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Storer v. Brown*, 415 U.S. 724 (1974). The Court has expressly recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 730. Given the compelling state interests served by § 2-7-111, the statute falls well within the range of reasonable regulations of the electoral process that the Court has upheld against First Amendment challenges.

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[1] The parties' letters of consent have been filed with the Clerk pursuant to this Court's Rule 37.3.

2. Almost every State has a law that, like § 2-7-111, establishes a boundary area around the polls in which electioneering is prohibited, a fact that demonstrates the widespread belief that such restrictions are necessary to the conduct of elections. Restrictions on electioneering immediately outside entrances to polling places serve several overlapping governmental interests. First, these restrictions help to protect the integrity of the election process by minimizing the possibilities (either in actuality or in appearance) for voter intimidation or governmental favoritism. Second, the restrictions help to preserve decorum around the polls by minimizing the possibilities for disorder and confusion. Third, restrictions on electioneering prevent congestion in front of polling places that could discourage some persons from voting. Finally, those restrictions prevent voters from being a captive audience to unwanted political solicitation.

3. Under this Court's decisions, these governmental interests, both separately and cumulatively, are compelling ones. The Tennessee Supreme Court did not rule otherwise in striking down § 2-7-111. Instead, that court held that § 2-7-111 was not the least restrictive means of advancing these interests. This holding was based in part on the existence of statutes outlawing voter intimidation and interference. In *Buckley v. Valeo*, 424 U.S. 1 (1976), however, the Court held that Congress could enact laws limiting campaign contributions to deal with the actuality and appearance of *quid pro quo* arrangements between elected officials and campaign contributors, even though there were already laws against bribery. Section 2-7-111 likewise provides necessary additional protection against the actuality and appearance of voter intimidation and interference with the electoral process.

The Tennessee Supreme Court also indicated that a more narrowly drawn restriction on electioneering, such as a 25-foot boundary, would be valid. *See* Pet. App. at 18a; *see also id.* at 19a (Fones, J., dissenting). But

Buckley v. Valeo also held that numerical limitations like the 100-foot boundary cannot be overturned on the ground that another numerical limitation might be a less restrictive means, unless the difference between the two limitations is so significant as to be a difference in kind. *See* 424 U.S. at 30. There is no basis on this record for concluding that the difference between the 100-foot limitation and a 25-foot limitation would be a difference in kind or, conversely, that a 25-foot limitation would serve Tennessee's interests as well. The Tennessee Supreme Court's judgment should accordingly be reversed.

ARGUMENT

SECTION 2-7-111 IS A REASONABLE REGULATION OF THE ELECTORAL PROCESS THAT SERVES COMPELLING STATE INTERESTS

Tenn. Code Ann. § 2-7-111 bars the display of campaign posters, distribution of campaign materials, and solicitation of votes within the area 100 feet from the entrance to a polling place. Respondent Rebecca Freeman, and those similarly situated, remain free under Tennessee law to solicit votes outside the 100-foot boundary established by § 2-7-111. Indeed, Ms. Freeman testified at trial that she has regularly—and successfully—solicited votes near polling places on election days for 17 years. J.A. at 18, 21-22. The issue presented is whether a state statute that requires that all electioneering be conducted at this reasonable distance from the entrances to polling places is unconstitutional.

"The present case is a good example of Justice Holmes' aphorism that 'a page of history is worth more than a volume of logic.'" *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 120 (1981) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). Almost every State has adopted a law that prohibits electioneering within a specified number of feet of a polling place. *See* Pet. App. at 21a-50a. The 100-foot

boundary chosen by Tennessee is typical. Whatever their precise formulation, the prevalence of such statutes and regulations is indicative of the widespread belief that restrictions on electioneering immediately outside the entrances to polling places are necessary to the conduct of free, fair, and orderly elections.[2] It has been assumed until recently that such restrictions on electioneering were valid exercises of state authority.[3]

Amici respectfully submit that the Court should give great weight to the long and widely held view that restrictions on electioneering immediately outside of polling places, such as those contained in § 2-7-111, are a valid and reasonable means of effectuating the States' compelling interests in regulating the electoral process. *Cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) (plurality opinion of White, J.) ("hesitat-[ing] to disagree with the accumulated, common-sense judgments of local lawmakers" concerning reasonable regulations of speech).

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[2] Like the States, the NLRB bars electioneering at or near polling places in union representation elections. *See, e.g., Michem, Inc.*, 170 N.L.R.B. 362 (1968); *Claussen Baking Co.*, 134 N.L.R.B. 111 (1961). The courts of appeals have upheld such regulation of electioneering by the NLRB. *See, e.g., Season-All Industries, Inc. v. NLRB*, 654 F.2d 932 (3d Cir. 1981); *NLRB v. Carroll Contracting & Ready Mix, Inc.*, 636 F.2d 111 (5th Cir. 1981); *Midwest Stock Exchange, Inc. v. NLRB*, 620 F.2d 629 (7th Cir.), *cert. denied*, 449 U.S. 873 (1980).

[3] A century ago the New Jersey Supreme Court upheld a ban on electioneering within 100 feet of a polling place against a free speech challenge based on the State's constitution. Its analysis remains pertinent today:

> The regulation is a proper one, to avoid disturbance and disorder immediately about the polls. While a man has a right to express his opinions, the exercise of this right, like all other rights is the subject of reasonable police regulation.

State v. Black, 54 N.J.L. 446, 24 A. 489, 491 (Sup. Ct. 1892), *aff'd per curiam sub nom. Ransom v. Black*, 65 N.J.L. 688, 51 A. 1109 (Ct. Err. & App. 1900).

A. The States May Reasonably Regulate the Electoral Process

The States have compelling interests in "maintain[ing] peace, order and decorum" at the polls, *Mills v. Alabama*, 384 U.S. 214, 218 (1966), and in "preserv[ing] the integrity of their electoral processes." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The States are, in fact, primary guardians of the electoral process. The power to regulate state elections is reserved to the States by the Tenth Amendment. *See Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J., announcing judgment of the Court). Towards this end,

> States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). The Court accordingly has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Id.* at 788 & n.9 (collecting cases).

For example, the Court has repeatedly upheld regulations concerning qualification for a place on the ballot. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986); *American Party of Texas v. White*, 415 U.S. 767, 782 & n.14 (1974); *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). It has done so even though the right to associate for the

"common advancement of political beliefs" is integral to the First Amendment's protection of free expression, *see Kusper v. Pontikes*, 414 U.S. 51, 56 (1973), and the "exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day." *Anderson v. Celebrezze*, 460 U.S. at 787-88.

Thus, in *Storer v. Brown*, the Court sustained against First Amendment challenge a state statute that denied ballot access to an independent candidate if the candidate had been affiliated with any political party within one year prior to the immediately preceding primary election. The Court grounded its holding on "the State's interest in the stability of its political system." 415 U.S. at 736.

Similarly, in *Munro v. Socialist Workers Party*, the Court upheld a State's requirement that a minor-party candidate for an office receive at least 1% of votes cast for that office in a primary election before the candidate's name could be placed on the general election ballot. The Court emphasized that the First Amendment rights asserted by the candidate were "not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively." 479 U.S. at 193. *See also Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973) (upholding state statute requiring voters to be affiliated with a party for 11 months as a prerequisite to voting in that party's primary).

Several important principles emerge from these cases. A reasonable, nondiscriminatory electoral regulation is not "invidious or arbitrary" and should be sustained if it is specifically designed to remedy an evil that could undermine "the integrity of the electoral process." *See Storer v. Brown*, 415 U.S. at 731 (internal quotations omitted). In this area of state regulation, moreover,

> the Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for

> the entire citizenry, merely in the interest of particular candidates and their supporters . . . .

Id. at 736.

Furthermore, the State need not make a "particularized showing" of "voter confusion" or other such problems "prior to the imposition of reasonable restrictions". *Munro*, 479 U.S. at 194-95. Nor does the State bear a "burden of demonstrating empirically the objective effects on political stability that [are] produced" by the regulation in question. *Id.* at 195. On the contrary,

> such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-96.

Recognizing the substantial state interests at stake, the Court, in reviewing challenges to specific provisions of a State's election laws, has not employed any " 'litmus paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. at 730). Instead, as the Court stated in *Anderson*, a reviewing court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's right.

Id. Balancing these factors, the Court has on numerous occasions upheld restrictions contained in state election laws against First Amendment challenges. *See* cases cited *supra* at 6-7. The Court should likewise uphold the 100-foot boundary established by § 2-7-111. As *amici* show below, § 2-7-111 serves compelling state interests in a narrowly tailored fashion, while imposing minimal burdens on respondent's First Amendment rights.

B. The Restrictions on Electioneering Contained in § 2-7-111 Serve Compelling State Interests

1. *The Purposes Underlying § 2-7-111*

The general purposes of Tennessee's election laws, set out in Tenn. Code Ann. § 2-1-102, include securing the "freedom and purity of the ballot" and encouraging the "[m]aximum participation by all citizens in the electoral process." In 1972, the State's Law Revision Commission proposed retention of the 100-foot boundary now contained in § 2-7-111 because it protected "the purity of elections" and made "the site of polling places as neutral as reasonably possible."[4] The trial court explained the "purity" purpose in more specific terms, finding that § 2-7-111 protects "voters and election officials from interference, harassment or intimidation during the voting process." Pet. App. at 5a. The Tennessee Supreme Court did not overturn this finding, just as it did not contest the "State's rationale for the 100-foot 'buffer zone' around polling places [as being] the prevention of interference with voting, confusion, mistakes, and overcrowding at polling places." Pet. App. at 14a. Indeed, the

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[4] Tennessee Law Revision Comm'n, *Special Report of the Law Revision Commission to Eighty-Seventh General Assembly of Tennessee Concerning a Bill to Adopt an Elections Act Containing a Unified and Coherent Treatment of All Elections* at 13 (1972) (reprinted in Appendix to Petitioner's Brief); Tennessee Law Revision Comm'n, *An Elections Act Recommended to the Eighty-Seventh General Assembly by the Law Revision Commission with Section-by-Section Comments* at 91 (1972) (reprinted in Appendix to Petitioner's Brief).

court acknowledged that the State has "an interest in maintaining peace, order and decorum at the polls and 'preserving the integrity of their electoral processes.'" *Id.* (quoting *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) and citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

The analysis of the Tennessee courts—as well as that of courts in other States[5]—establishes that the following compelling interests are served by the prohibition of electioneering outside the entrances to polling places: (1) protecting the integrity of elections against the actuality or appearance of voter intimidation by campaign workers and against the actuality or appearance of governmental favoritism in regulating those workers; (2) promoting a measure of decorum appropriate to polling places; (3) minimizing congestion near the entrances to the polling places that could discourage potential voters from voting; and (4) preventing voters waiting to vote from becoming a captive audience to unwanted political solicitation.

2. *Protecting the Integrity of Elections*

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San*

[5] *See State v. Robles*, 88 Ariz. 253, 355 P.2d 895, 897 (1960) ("The purpose of these notices, limiting the area within the [50-foot] boundaries of which voters who have voted and other interested persons other than those named in the Act may not remain, is to prevent interference with the efficient handling of the voters by the election board and to prevent delay or intimidation of voters entering the polling place by political workers seeking a 'last chance' effort to change their vote."); *Feld v. Prewitt*, 274 Ky. 306, 118 S.W.2d 700, 703 (1938) (purpose of 50-foot boundary is to preserve the secrecy of the ballot); *Xippas v. Commonwealth*, 141 Va. 497, 126 S.E. 207, 208 (1925) (purpose of election law including among other provisions a 100-foot boundary was "to secure regularity in the conduct of elections and primaries, to secure fairness in elections and primaries, and to prevent and punish any corrupt practices in connection therewith"); *State v. Black*, 24 A. at 491 (purpose of 100-foot boundary around polling place is "to avoid disturbance and disorder immediately about the polls.").

Francisco County Democratic Comm., 489 U.S. 214, 231 (1989). Restrictions on electioneering immediately outside the entrances to polls further this compelling interest by protecting against voter intimidation and political favoritism.

a. *Preventing Voter Intimidation.* The prohibition of electioneering outside the entrances to polling places serves a State's interest in electoral integrity because it lessens opportunities for voter intimidation and interference with elections. Under the regime established by § 2-7-111, a voter is given a safe haven from campaign workers. In the absence of § 2-7-111, each entrance would become a potential base for last-second efforts to intimidate susceptible voters by pressuring them to vote in a particular way or by discouraging them from voting at all.

The Tennessee Supreme Court generally dismissed the possibility of voter intimidation with its allusion to voters being accosted by "annoying campaign workers armed with cheap ball point pens and fingernail files embossed with a candidate's name." Pet. App. at 16a. But elections in the United States have not invariably been conducted under pristine conditions.[6] Nor are such concerns

[6] One commentator, writing in 1934, stated: "Not many years ago it was taken for granted that there would be a great deal of drunkenness, disorder, violence, bribery, and other malpractices at the polls." J. Harris, *Election Administration in the United States* 20 (Brookings Institution, Institute for Government Research, Studies in Administration No. 27, 1934).

Tennessee has not been without challenges to the integrity of its elections. "It is common knowledge," it was written in 1947, "that the administration of election in Tennessee has been accused by allegations of many irregularities, sharp practices, and frauds." *Report of the Election Law Commission to the Seventy-Sixth General Assembly of Tennessee* 8 (1947) (quoted in Tennessee Legislative Council Committee, *Study on Election Laws, 1966, Final Report* 6 (1966)).

entirely a thing of the past. The State's witness at the trial, the Registrar for Davidson County, testified that she had witnessed election day "incidents", including an altercation "between a voter and an intoxicated poll watcher" that resulted in one of them being hospitalized. J.A. at 39. At a minimum, a prohibition of electioneering outside the entrances to polling places reduces the potential for disorder and voter intimidation.

It is no answer to these concerns to point out, as the Tennessee Supreme Court did, that there are other statutory provisions that make voter intimidation or interference with an election a crime. *See* Pet. App. at 16a-17a & n.2 (quoting Tenn. Code Ann. §§ 2-19-101, -115). These criminal laws cannot deal with the problem until the election is over; a State has a compelling interest in not having to repeat elections. *See Munro*, 479 U.S. at 195-96. As a practical matter, moreover, criminal laws can be expected to remedy only egregious cases. The Court held in analogous circumstances in *Buckley v. Valeo*, 424 U.S. 1 (1976), that limitations on campaign contributions were a valid way to protect against the corruption of *quid pro quo* arrangements between elected officials and contributors, even though there were already laws against bribery, because those laws "deal with only the most blatant and specific attempts of those with money to influence governmental action." *Id.* at 28.

The Court further held in *Buckley v. Valeo* that a government has a right not only to legislate against the actuality of improper influence in the election process, but also against its appearance. "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical.'" 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)); *accord FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982). A state legislature could reasonably conclude that crowds of campaign workers ag-

gressively soliciting votes at entrances to polling places would create the appearance of intimidation.

b. *Protecting Against Favoritism.* The restrictions on electioneering contained in § 2-7-111 also protect the integrity of the voting process by helping to ensure government neutrality. When all electioneering is conducted at a specified distance from the polling place, all campaign workers are placed on an equal footing to solicit votes. If voter solicitation can be conducted right up to the door of the polling place, the relative position of campaign workers will become important. It could appear to voters that the campaign workers who occupy the most favorable positions near the entrance are those whose candidate or position is favored by the incumbent authorities.

Tennessee, like other States, has a compelling interest in protecting its voting process against the appearance of governmental favoritism, for that appearance creates doubts in the voters' minds about the integrity of the election process. In that respect this case is like *CSC v. Letter Carriers*, in which the Court upheld the Hatch Act on the ground that "it is not only important that the Government and its employees in fact avoid practicing *political* justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 565 (emphasis added). *Cf. Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 809 (1985) ("[A]voiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum."); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion of Blackmun, J.) (city can bar political advertising on transit system in part because there "could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians").

3. *Protecting the Decorum of the Polls Against Disorder and Confusion*

An interest closely related to protecting the integrity of the election process is that of minimizing disorder at the polls. Electioneering can be heated, especially if campaign workers are allowed to cram into close quarters immediately outside the entrances to polling places. A State could reasonably conclude that disorderly conduct is likely to occur in such a highly charged setting. Such conditions at the polling place are inimical to the ideal of the American democratic process, in which voters freely cast their votes after thoughtful deliberation in an atmosphere of peace. Restrictions on electioneering immediately outside the entrances to polling places help to preserve a measure of decorum around the polls and prevent disorder and confusion by keeping campaign workers at a reasonable distance.[7]

The court below conceded the validity of the State's interest in protecting the decorum of the polls. Pet. App. at 14a. More significantly, this Court has also recognized this interest In *Mills v. Alabama*, the Court struck down a law that made it a crime for a newspaper editor to publish an editorial on election day urging persons to vote in a particular way. *See* 384 U.S. at 219-20. The Court was careful, however, to "point out at once that this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order, and decorum there." *Id.* at 218.

4. *Minimizing Congestion So as To Maximize Voter Participation*

Another purpose of the 100-foot boundary established by § 2-7-111 is to prevent congestion around the entrances to polling places. Such congestion may obstruct ingress and egress to such an extent that voters are discouraged from voting. Any such result would be contrary to Tennessee's declared policy of encouraging "[m]aximum participation by all citizens in the electoral process." Tenn. Code Ann. § 2-1-102.

[7] Moreover, crowds of campaign workers milling around outside the entrances to polling places can lead to errors by election officials. The Registrar of Davidson County testified that without the 100-foot boundary, there would be "mass confusion" and the "possibility of mistakes" by election officials. J.A. at 47.

The State's interest in ensuring ready access to and from polling places is surely a compelling one in First Amendment jurisprudence. The Court has recognized this interest in similar contexts. In *Cameron v. Johnson*, 390 U.S. 611 (1968), the Court upheld against a facial attack a statute prohibiting the picketing of a courthouse in such a manner as to obstruct or unreasonably interfere with access to it. *See also Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion of O'Connor, J.) (noting that the District of Columbia's prohibition of displays near embassies had not been justified as necessary to prevent "congestion" or "interference with ingress or egress").

5. *Protecting a Captive Audience*

The 100-foot boundary established by § 2-7-111 prevents voters from becoming a captive audience for campaign workers. The Registrar for Davidson County testified that she had received complaints from voters who "felt like . . . their rights, their privacy was infringed upon by the handing out of campaign material." J.A. at 40. Those voters would no doubt agree with the NLRB's position, taken in the context of union representation elections, that "[t]he final minutes before [a person] casts his vote should be his own, as free from interference as possible." *Michem, Inc.*, 170 N.L.R.B. at 362.

For the sake of argument, one may agree that the voters' desire to be left alone may not be particularly weighty as against campaign activity conducted at a dis-

tance from the polling place, for at sufficient distances voters can avoid campaign workers with relative ease. *Cf. Cohen v. California*, 403 U.S. 15, 21-22 (1971); *Schneider v. State*, 308 U.S. 147 (1939). The voters' interest in not being a captive audience, however, becomes compelling at distances close to the entrances to polling places where voters may have to line up to vote. Without a reasonable boundary, even voters inside the polling place may be within talking distance, and certainly within shouting distance, of campaign workers.

Under these circumstances, voters are as entitled to protection from unwanted political solicitation as were the commuters in *Lehman v. City of Shaker Heights*, in which the Court upheld a ban on political advertising in a city's transit system, partly on the ground that commuters were a captive audience. *See* 418 U.S. at 304 (plurality opinion of Blackmun, J.) (citing the "risk of imposing upon a captive audience"); *id.* at 308 (Douglas, J., concurring) ("I do not believe that petitioner has any right to spread his message before this captive audience.").

C. Section 2-7-111 Is Narrowly Tailored To Serve the State's Interests

Rather than disapprove of the interests served by § 2-7-111, the Tennessee Supreme Court held that the 100-foot boundary was not the least restrictive means of advancing those interests. *See* Pet. App. at 15a-17a. The court suggested, first, that the criminal laws against voter interference and intimidation were adequate to serve the State's interests. *See id.* at 16a-17a. Those statutes deal only with the most blatant forms of coercion, however, and then only after the fact. *See* discussion *supra* at 12-13. *Buckley v. Valeo* held that a government can properly legislate to prevent more subtle forms of improper influence, as well as the appearance of such influence. *See* 424 U.S. at 27-28.

The Tennessee Supreme Court also suggested a more narrowly drawn boundary (such as 25 feet) "might perhaps pass constitutional muster." Pet. App. at 18a (citing *NBC v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988)). There is, however, no basis for concluding that, given the need for some restriction on electioneering outside the entrances to polling places, a 25-foot boundary is valid, but a 100-foot boundary is not. In *Buckley v. Valeo*, for example, the Court declined to rule that a $1,000 contribution limit was unnecessarily low: "As the Court of Appeals observed, '[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as a $1,000.' . . . *Such distinctions in degree become significant only when they can be said to amount to differences in kind.*" 424 U.S. at 30 (quoting *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975)) (emphasis added).

At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become a total ban akin to the statute struck down in *Mills*. *See* 384 U.S. at 216 n.2, 220 (striking down law that prohibited any soliciting of votes on election day). But this is plainly not what the Tennessee legislature has done here. Although there may be a theoretical bright line at which reasonable regulation becomes unreasonable restraint, it is both unnecessary and inadvisable for this Court to declare where that line is and thereby "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). *See also Anderson v. Celebrezze*, 460 U.S. at 789 (in reviewing challenges "to specific provisions of a State's election laws," the Court has not employed any "litmus paper test that will separate valid from invalid restrictions") (internal quotations omitted). It suffices to say that in establishing a 100-foot boundary, the Tennessee legislation is on the constitutional side of the line.

D. Section 2-7-111 Is Not Underinclusive

Although it does not prohibit non-political speech near entrances to polling places, § 2-7-111 is not underinclusive, nor is there any support in the record for such a conclusion. At trial, respondent testified only to a vague recollection of having once seen commercial solicitation at a polling place, and she did not say that this solicitation took place inside the 100-foot boundary. J.A. at 24. The Registrar for Davidson County testified that she was not aware of any instance in which a commercial entity or a religious denomination had passed out literature within the 100-foot boundary on election day. J.A. at 40. There is no basis for concluding that non-political solicitation presents the same dangers of disorder and congestion as does electioneering, for there is no evidence that non-political solicitation occurs near polls to any significant degree. And there is no reason at all to conclude that non-political solicitation carries with it the same potential dangers to the integrity of the election process as would unregulated electioneering at the entrance to polling places.

Tennessee and those States with similar laws that apply only to electioneering have been conducting elections for many decades. A state legislature could reasonably conclude that only electioneering poses such dangers as intimidation, congestion, and other threats to the integrity of the electoral process. There is no reason for striking down laws, such as § 2-7-111, that regulate the forms of solicitation that, in the legislature's judgment, do present potential dangers to the electoral process, merely because those laws do not regulate other forms of solicitation. As Justice O'Connor stated for the plurality in *United States v. Kokinda*, 110 S. Ct. 3115, 3123 (1990), it would be "anomalous that the [government's] allowance of some forms of speech would be relied upon as evidence that it is impermissibly suppressing other speech." *See also Renton v. Playtime Theatres, Inc.*, 475

U.S. 41, 52-53 (1986) (declining to invalidate zoning ordinance that regulates the secondary effects of adult theaters merely because it fails to regulate other adult businesses not present in the city; no basis for assuming city will not regulate such other businesses if warranted in future) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955)).

CONCLUSION

The judgment of the Supreme Court of Tennessee should be reversed.

Respectfully submitted,

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